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Supreme Court, U.S.
FILED
JUL 25 2003
OFFICE OF THE CLERK

Jul 25 2003
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No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, L.L.P.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES IN SUPPORT OF RESPONDENT

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21 pp

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

NASUCA is a non-profit national association organized in 1979, comprising 42 offices of utility ratepayer advocates in 40 states and the District of Columbia who operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

NASUCA's members represent millions of American consumers served by public utilities in state and federal regulatory proceedings, in testifying before Congress and federal regulatory agencies, and in appearing before state and federal courts on matters concerning rates and service quality. In addition to furthering members' roles as utility consumers' advocates, NASUCA is charged with exchanging ideas, improving consumer representation in federal and state government, and educating and encouraging greater participation by consumers in the regulatory process. NASUCA is active before the Federal Communications Commission ("FCC") in proceedings implementing the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 151 *et seq.* ("1996 Act" or "the Act"). In addition, NASUCA is represented on the Federal-State Joint Board on Universal Service and other FCC advisory bodies concerned with the Act's implementation.

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[1] The parties to this action filed with the Clerk of the Court a blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no persons other than the National Association of State Utility Consumer Advocates ("NASUCA") have made a monetary contribution for the preparation or submission of this brief.

The history of the consumer movement demonstrates that vigorous competition is an effective tool for achieving the best quality and lowest price of goods and services. NASUCA has long recognized the critical role antitrust laws play in advancing competition and consumer choice in telecommunications, including the divestiture of the Bell system that brought consumer choice to the long distance market. In order to advance the nation's economic policy to benefit consumers by favoring competition over monopoly power, the private treble damages provision of the antitrust laws was enacted both to compensate individuals and to enforce that economic policy.

On behalf of utility consumers, NASUCA was active in the legislative process that led to enactment of the 1996 Act. As stated in its Preamble, the Act's overriding purpose is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the deployment of new telecommunications technologies." Accordingly, competition is a tool utilized to serve the Act's pro-consumer objective; competition is not merely intended to vindicate the telecommunications carriers' corporate interests. The 1996 Act represents this Nation's commitment to transition from a monopoly local service market to one that is robustly competitive, for the ultimate benefit of all telecommunications consumers nationwide.

Since enactment of the 1996 Act, competition in the local exchange telecommunications market, especially for the residential consumers represented by NASUCA, has advanced at an agonizingly slow pace. Most consumers still spend more each month on local service than on long distance and other telecommunications services. For many consumers there is still no choice of local service provider other than the incumbent. Consumers have a substantial economic stake in ensuring access to the network that is at the heart of the

statutorily mandated interconnection process set forth in the 1996 Act. Inseparable from that stake is consumer standing to assert antitrust claims to redress telecommunications carriers' anticompetitive conduct in the new marketplace, which may as a separate matter violate the Act designed to provide consumers with wider choice, lower costs, and higher quality service.

SUMMARY OF ARGUMENT

At the outset, NASUCA wishes to make clear that its *amicus* brief primarily discusses the policy grounds for recognizing the continued need for, and efficacy of, private rights of action under the antitrust laws to remedy monopolistic conduct in the newly competitive local market. Of greatest emphasis is the issue whether the Act expressly or impliedly provides petitioner with immunity from liability under federal antitrust laws for acts that may also involve or violate the duties and obligations of carriers under the 1996 Act. NASUCA believes that no immunity from antitrust law is conferred upon the petitioner by the Act, either expressly or impliedly. Further, NASUCA believes that conferring such immunity upon incumbent local exchange carriers ("incumbent LECs" or "ILECs") would defeat the pro-consumer goals of both the 1996 Act and the federal antitrust laws. NASUCA does not address the finer points of federal antitrust law here, nor does NASUCA address the issue whether the respondent adequately pleaded the necessary elements of a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, in its amended complaint in the District Court. Those issues are ably discussed at length in respondent's brief and other *amici* briefs in support of respondent.

This Court has previously recognized both the bottleneck nature of the telephone network as a formidable barrier to competition in the local exchange market, and the crucial role access to the network plays in overcoming that problem. Access to the network is essential if consumers are to have a

choice of local providers in the markets fostered by the 1996 Act. The benefits of the interconnection process are intended to flow to consumers, with greater choice, lower prices and improved quality of service. In order to protect that interest, consumers must have standing to use the antitrust laws, including the right to seek treble damages, when incumbent LECs' monopolistic practices frustrate the provision of reliable service, as alleged by respondent Trinko in the case below. Recognizing that consumers may bring actions under existing antitrust laws is also necessary to give meaning and effect to the 1996 Act's savings clause, which made it clear that the Act's elaborate regulatory scheme is not intended to preclude any claims viable under the antitrust laws.

The consumer interest and the need for consumer redress are distinct from those of potential entrants and competitors, with no danger here of duplication of recovery. The fines imposed by regulators for violations of the 1996 Act are awarded either to competitors or the government. Those fines are inadequate to protect consumers; indeed, without a consumer remedy, an antitrust violator may find violating the antitrust laws to be economically efficient. Furthermore, no regulator charged with implementing the 1996 Act has authority to impose treble damages or injunctive relief to protect consumers against monopolistic violations of the Act's regulatory scheme, even when such violation deprives consumers of choice, lower prices or better quality of service.

The millions of consumers that NASUCA represents are adversely affected when anticompetitive conduct by incumbent monopolies breaches their obligations under the Act, regardless of what, if any action is taken by new or prospective entrants in response. Specifically, a violation of the 1996 Act's mandated interconnection process harms consumers if, as a result of the violation, the competitor charges consumers more for local telephone service or, as alleged by respondent, provides lower quality service.

Alternatively, if as a result of the incumbent's conduct, existing competitors exit the local market or prospective competitors decide not to enter the market, all consumers in that market are deprived of a competitive choice for local service. If the competitor is deterred from vigorously contesting the anticompetitive behavior only as it affects its largest volume customers, then residential consumers with lower volume usage are deprived of a competitive choice for local telephone service in that market.

In the circumstances of this case, respondent—and consumers generally—have standing to assert an antitrust claim for anticompetitive conduct by an incumbent LEC that harms consumers by frustrating competition, increasing price, reducing quality, or consumer choice. The ruling of the United States Court of Appeals for the Second Circuit should be affirmed as advancing, not undermining, the Congressional objectives of the antitrust laws and 1996 Act; those laws are intended to be and do serve as complements of each other in protecting the consumer interest.

I. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT CONFER IMMUNITY FROM LIABILITY UNDER FEDERAL ANTITRUST LAWS

A. The Telecommunications Act of 1996 Expressly Preserves Private Antitrust Actions.

The 1996 Act radically altered the regulatory regime previously applicable to local telecommunications service. In the Act, Congress mandated that competition in the local telecommunications market should be fostered and imposed a range of duties on incumbent LECs—regulated monopolies—intended to facilitate competitors' entry into those markets for the benefit of consumers. The statutory *quid pro quo* for compelling the incumbent LECs to open their networks and markets to competition, of course, was the promise that once

they fully opened their networks, the incumbent Bell operating companies could themselves enter the interLATA long distance telecommunications market, something from which they had been barred since the breakup of AT&T in 1984. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491-94 (2002) and *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

Sections 251 and 252 of the 1996 Act—together with the antitrust laws—are the cornerstones of Congress' program for fostering competition in the local telecommunications market. Section 251(b) establishes the general duty of all local telecommunications carriers to interconnect with one another's facilities and equipment. Section 251 (c) requires incumbent LECs to negotiate, in good faith, agreements with competitors that fulfill their Section 251 (b) duties by, among other things: providing interconnection to requesting carriers (*i.e.*, new entrants); providing access to unbundled network elements; providing wholesale discounts for retail services that new entrants wish to resell; and giving reasonable public notice of changes in their services that would affect others. 47 U.S.C. §§ 251(b) & (c); *see Verizon Communications,* 535 U.S. at 491-92. Section 252 provides for the negotiation, arbitration and review of those agreements between new entrants and incumbents. State regulatory commissions, the Federal Communications Commission ("FCC") and the courts all have roles to play in reviewing, approving and enforcing these interconnection agreements. *See, e.g.*, 47 U.S.C. §§ 252(b)(l)(4), (c) & (e)(1), (5) & (6).

The primary purpose of 1996 Act's mechanisms in Sections 251 and 252 is to benefit consumers, not telecommunications carriers, by opening the local telecommunications market to competition. This pro-consumer goal of the 1996 Act is expressed in its Preamble: "*To promote competition . . . in order to secure lower prices and higher quality services for American telecommunications consumers*

and encourage the rapid deployment of new telecommunications technologies." (emphasis supplied) Congress made clear its preference for competition, noting that "U.S. telecommunications policy [had for decades] relied on heavily regulated monopolies to provide telecommunications to businesses and consumers." H. Rep. 104-204, 104th Cong., 2d Sess. 48, *reprinted in* 1996 U.S.C.C.A.N. 11. Congress believed that "[t]echnological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies." *Id*

Although the 1996 Act is clearly intended to benefit consumers by opening the local telecommunications monopoly to competition, the Act does not include any specific new mechanisms for consumers to protect and advance their interests in a competitive market *vis a vis* the incumbent, local monopolies. However, the 1996 Act contained several provisions that made it clear that consumers' rights under antitrust laws were not preempted or superseded as a result of the regulatory regime designed by Congress to foster competition in the local market.

In Section 601(b) of the 1996 Act, Congress retained the general savings clause contained in Section 152 of the Act, which states that "nothing in this Act or in the amendments made by the Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Telecommunications Act of 1996, Pub. L. No. 104-104 § 601(b)(1), 110 Stat. 56, 143 (1996), *codified at* 47 U.S.C. § 152 note. On its face, this clause compels the conclusion that consumers retain all their preexisting rights to bring private antitrust actions against carriers engaged in unlawful, monopolistic practices. But to make it even clearer that private antitrust rights were retained, and not restricted or eliminated, Congress included a second savings clause in Section 601(c) of the Act, under the heading "Federal, State,

and Local Law," which provides: "No Implied Effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." *Id.* § 601(c)(1). The Act's savings clause is "plain on its face and must guide our analysis." *Law Offices v. Bell Atlantic Corp.*, 305 F.3d 89, 109 (2nd Cir. 2002).[2]

The plain language of the 1996 Act compels the conclusion that private antitrust rights are preserved and retained. The 1996 Act's legislative history makes this point clearer still, because Congress emphasized that incumbent LECs, like the petitioner here, remain subject to federal antitrust law.[3] The

[2] If Congress had intended to limit or abrogate consumers' private rights of action under existing antitrust laws in the 1996 Act, it would have done so. Congress did just that in connection with at least one provision of the 1996 Act. Section 255 of the 1996 Act imposes obligations on telecommunications carriers and equipment manufacturers to provide persons with disabilities with access to telecommunications service, 47 U.S.C. § 255. But Congress specifically eliminated any private right of action to enforce these obligations and vested the FCC with exclusive jurisdiction over any complaints arising under Section 255. 47 U.S.C. § 255(f).

[3] For example, Representative Conyers stated:

> Antitrust law is synonymous with low prices and consumer protection—and that is exactly what we need in our telecommunications industry. . . . [T]he bill contains an all-important antitrust savings clause which *ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the [Bell operating companies] cannot use their market power to impede competition and harm consumers.*

142 Cong. Rec. H1145-06 (daily ed. February 1, 1996) (emphasis supplied). *Accord*, Remarks of Sen. Thurmond, 142 Cong. Rec. S687-01 (daily ed. February 1, 1996) ("the unequivocal antitrust savings clause . . . explicitly maintains the full force of the antitrust laws in this vital industry"); *and* Remarks of Sen. Leahy, 141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) ("we must rely on . . . antitrust law in

Executive Branch echoed Congress' intent that private antitrust actions remain viable, in order to complement the obligations imposed on incumbent LECs under the regulatory regime established in the Act.[4]

B. There Is No Implied Conflict Between The 1996 Act And The Respondent's Private Antitrust Claim.

Despite the plain language of the 1996 Act, its drafters' obvious intent, and the Executive Branch's understanding of both, some courts have concluded that "the more specific legislation [in the 1996 Act] must take precedence over the general antitrust laws, where the two are covering precisely the same field." *See Goldwasser v. Ameritech Corp.*, 222 F.3d

order to move as quickly as possible toward competition in all segments of the telecommunications industry [and]. . . to ensure that the free market will work to spur competition"). *See also Cavalier Telephone v. Verizon Virginia*, 330 F.3d 176, 189 (4th Cir. 2003)(citations omitted).

[4] President Clinton stated: "The Act's emphasis on competition is also reflected in its antitrust savings clause. *This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.*" Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), *reprinted in* 1996 U.S.C.C.A.N 228-1, 228-3 (emphasis supplied). The FCC likewise recognized the continuing vitality of private rights of action under federal antitrust law. In its initial order implementing the local competition provisions of the 1996 Act, the FCC acknowledged that its regulations do not provide "the exclusive remedy" for anticompetitive conduct. "First Report and Order," *I/M/O Implementation of the Local Competition Provisions of the Tele-communications Act of 1996*, CC Docket No. 96-98, FCC 96-325 (August 8, 1996), at ¶ 124. The FCC emphasized that "'parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," specifically including private antitrust enforcement. *Id.* at ¶ 129. On this point, the FCC was crystal clear: "[W]e clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id.*

391, 401 (7th Cir. 2000). This cannot be correct.[5] There simply is no conflict between the 1996 Act and the respondent's private antitrust claims. Rather, in order to fully protect consumers under the Act's new regulatory model and to secure the promised benefits of a competitive marketplace, the two legal regimes complement—rather than trump—one another.

The *Goldwasser* court based its dismissal of antitrust claims on the grounds that the allegations in the complaint were "inextricably linked to claims under the 1996 Act." *Goldwasser*, 222 F.3d at 401. But as the Eleventh Circuit noted, the *Goldwasser* decision relied heavily on the manner in which the specific allegations in the plaintiff's complaint were pleaded. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1282 Fn. 8 (11th Cir. 2002). The consumers in *Goldwasser* focused their claims on the incumbent LEC's alleged violations of various sections of the 1996 Act, and included a "by the way" allegation that the incumbent's violations of the Act also constituted violations of Section 2 of the Sherman Act. *Goldwasser*, 222 F.3d at 394-95. The 1996 Act did not eliminate the requirements for pleading a federal antitrust claim and the *Goldwasser* court's dismissal may have been appropriate on purely procedural grounds.[6] But the Seventh Circuit did not stop with the

[5] Even the Seventh Circuit acknowledged problems with this formulation, writing: "Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute. It is that the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets . . . ." *Goldwasser*, 222 F.3d at 401.

[6] Again, however, NASUCA does not intend to address the issue whether a complaint adequately states a claim for violation of Section 2 of the Sherman Act, either in the context of this case or in *Goldwasser*.

technical insufficiency of the plaintiffs' pleadings. Instead, the *Goldwasser* court perceived a conflict between the Act and federal antitrust laws that simply finds no support in either body of law; an illusory conflict properly rejected by the Second Circuit. *Bell Atlantic*, 305 F.3d at 109; *accord BellSouth*, 299 F.3d at 1282.

There is yet another flaw in the Seventh Circuit's reasoning in *Goldwasser*. The Seventh Circuit attempted to articulate when its judicially created immunity from antitrust laws would end. The Seventh Circuit concluded that private antitrust claims would not lie against incumbent LECs for anticompetitive conduct arising out of obligations imposed under the 1996 Act until after the local telecommunications market is deemed sufficiently competitive. In defining this moment, the Seventh Circuit concluded that:

> At some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. Our holding here is simply that this is not what Congress has mandated at this time for the ILEC duties that are the subject of the Goldwasser complaint.

Id. at 401-02.

The court, however, cited no legal authority for the distinction it drew between telecommunications markets to which the antitrust savings clause applies, and those markets to which it does not. Certainly nothing in the 1996 Act itself created such distinctions. More importantly, there is nothing in the legislative history of the 1996 Act suggesting that antitrust laws would be abated at the discretion of a court or regulator during the transition to competition in the local market. To the contrary, the legislative history evidenced the Act's drafters' intent that incumbent LECs' pro-competition duties under the 1996 Act would apply concurrently with

antitrust law's penalties for anticompetitive conduct by monopolists. As noted above, Congress made it clear that the antitrust savings clause in the 1996 Act applies *now*, to the nascent competitive local telecommunications market, *in order to ensure the transition to fully competitive local markets,* an intent recognized by the FCC.[7]

As authority for the proposition that the 1996 Act's competitive regime preempts or supersedes existing antitrust laws, the *Goldwasser* court's decision is simply in error. On the other hand, NASUCA does not take issue with the *Goldwasser* court's decision that consumers wishing to pursue private antitrust claims against incumbent LECs must affirmatively plead the elements of a violation of Section 2 of the Sherman Act.

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[7] The *Goldwasser*'s court's assumption that the FCC would pronounce the local markets competitive, at some later date, thereby restoring federal antitrust laws, misapprehends both the nature of the local telecommunications market, and the role of the FCC and state commissions in the local telecommunications market. For one thing, there is no monolithic, national "local market"; instead, there are at least 50 local markets (*i.e.*, each state), each experiencing the transition to competition differently. Setting aside the fact that there is no role in the 1996 Act for the FCC to "declare" the local market open to competition, the Seventh Circuit ignored state commissions' role in determining the competetiveness of their local telecommunications markets. Many states have statutes that expressly provide for various degrees of deregulation once the state commissions determine that a particular telecommunications market within the state is subject to competition. *See, e.g., Del Code Ann. tit.* 26, §§ 705(c) & 709; *Kan. Stat. Ann.* § 66-2005(g); *Ohio Rev. Code Ann.* § 4927.03; *Wash. Rev. Code* §§ 80.36.300 - .330; *W. Va. Code* § 24-2-3c. What effect such state commission decisions would have on the FCC declaration anticipated by the *Goldwasser* court is unclear (*i.e.*, would the FCC defer to prior state commissions' competition determinations and, if so, to what extent). The Seventh Circuit certainly did not consider these questions.

II. RECOGNIZING THAT CONSUMERS RETAIN PRIVATE RIGHTS OF ACTION UNDER ANTI-TRUST LAWS DOES NOT UNDERMINE THE PRO-CONSUMER SCHEME OF THE 1996 ACT.

An underlying concern expressed by the *Goldwasser* court in support of its decision was the court's concern with parties using federal antitrust laws to make an "end run" around the "elaborate system of negotiated agreements and enforcement established by the 1996 Act." *Goldwasser*, 222 F.3d at 401. However, this concern clearly does not apply in situations where, as in the case at bar, the plaintiff asserting antitrust claims against an incumbent LEC is a consumer, a point of distinction correctly noted by the court below. *Bell Atlantic*, 305 F.3d at 110.

Consumers are obviously intended to be the primary beneficiaries of the 1996 Act. Yet consumers are not specifically included in the mechanisms, set forth under Section 252 of the Act, that are primarily designed to encourage new providers' entry into the local market. Clearly, consumers are not parties to the negotiation, arbitration or enforcement of the interconnection agreements in which carriers' competitive relationships are spelled out under Section 252 of the Act. Nor does it appear that consumers can interject themselves into interconnection agreement negotiations or arbitration proceedings.[8] There is

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[8] Many state utility commissions have either denied, or greatly limited, the right of outside parties to intervene in proceedings regarding the approval of negotiated interconnection agreements, or arbitration proceedings regarding such agreements. *See, e.g., Citizens Utility Ratepayer Board v. McKee*, 946 F.Supp. 893 (D. Kan. 1996); *MCI Telecommunications Corp.*, Case No. 97-1210-T-PC (WV P.S.C., November 4, 1997); *In Re: AT&T*, Docket No. P-442, 1996 WL 769097 (MN P.U.C., December 2, 1996); *In Re: Telecommunications Act of 1996*, Case No. U-11134, 1996 WL 593693 (MI P.S.C., September 23, 1996); *In Re: Petition of AT&T for Arbitration*, Docket No. A-310125F0002 (PA P.U.C., November 14, 1996); *In Re: American Communication Services*

no question that Sections 251 and 252 of the Act establish an elaborate regulatory scheme for carriers negotiating and implementing interconnection agreements that mainly incorporate carriers' duties and obligations to each other under the new competitive model. But Section 252 of the Act does not, standing alone, constitute an enforcement mechanism over all anticompetitive conduct on the part of an incumbent LEC. It certainly does not provide an enforcement mechanism for consumers seeking to remedy anticompetitive behavior on the incumbent LEC's part.

This does not mean that antitrust claims are necessarily the only remedies available to consumers to address incumbent LECs' violations of the Act. The court below recognized that consumers may be able to assert claims under Sections 206 and 207 of the Communications Act of 1934 (1934 Act) for harms they suffer as a result of incumbent LEC actions that violate the 1996 Act. *Bell Atlantic*, 305 F.3d at 98, 102-03; 47 U.S.C. §§ 206 & 207.[9] However, the Second Circuit determined that the respondent's claims under Sections 206 and 207 were based on violations of duties under Section 251, duties that the court concluded were complied with when the petitioner executed an interconnection agreement with the respondent's local carrier. *Id.* at 104-05.[10]

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of Little Rock, Inc., Docket No. 96-257-U, 1996 WL 593911 (AR P.S.C., September 19, 1996); *In Re: Provision of Competitive Telecommunications Services*, Docket No. 94-114, 1996 WL 429193 (ME P.S.C., June 25, 1996).

[9] The *Goldwasser* court did not address the applicability of Sections 206 or 207 of the Communications Act of 1934 since the plaintiffs did not plead claims pursuant to those sections.

[10] Verizon relied on this aspect of the Second Circuit's decision in arguing to the FCC that, once it executes an interconnection agreement, the statutory duties set forth in Section 251 no longer apply. However, the FCC rejected Verizon's argument, ruling that incumbent LECs' obligations under Section 251 continue to apply, and may be violated, even where the provisions of the carriers' interconnection agreement are silent regarding the specific conduct the competitor complains of. *See* "Memorandum Opinion and Order," *I/M/O Core Communications, Inc. v. Verizon Maryland Inc.*, File No. EB-01-MD-007, FCC 03-96 (April 23, 2003), at ¶ 25.

Antitrust actions remain, however, the most effective mechanism available to consumers, injured by monopolistic practices, to compel incumbent LECs to comply with antitrust laws and achieve the 1996 Act's goals of fostering competition in the local market. Antitrust remedies are essential in light of the narrow circumstances under which consumers could maintain actions under Sections 206 and 207 of the 1934 Act.

III. RECOGNIZING CONSUMER PRIVATE ANTITRUST ACTIONS FURTHERS THE PRO-CONSUMER SCHEME OF BOTH THE 1996 ACT AND FEDERAL ANTITRUST LAWS.

Recognizing that consumers may bring private antitrust actions against incumbents, regardless of whether the underlying anticompetitive conduct implicates duties and obligations under the 1996 Act, furthers the pro-consumer, pro-competition goals of both regulatory regimes.

First, recognizing that consumers may bring private antitrust actions provides a remedy for those consumers who have been injured by an incumbent's anticompetitive conduct that undermines the goals of the 1996 Act. Although the wrongful denial of access to the local market harms both consumers and competing carriers, the injuries each suffers as the result of anticompetitive conduct on the part of the incumbent are distinct. The competitor suffers lost profits from the wrongful denial of access to the local market, while consumers lose consumer surplus. Randal C. Picker, "Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act?" at 10 http://www.law.uchicago.edu/Picker/Papers/Manhattan

200.pdf (*Prepared for a Dec. 9, 2002 conference at the Center for the Digital Economy at the Manhattan Institute).* Professor Picker notes that:

> As a general matter, when a single act hurts multiple parties, each person gets to sue for their losses. This is particularly relevant here, where the possibility of profits is precisely what induces entry—exactly what the 1996 Act seeks to encourage—and the consumer surplus that flows to consumers from entry is one of the core aims of the [1996] Act.

Id.

An incumbent's anticompetitive conduct that violates either or both the provisions of the 1996 Act and antitrust laws, has several possible effects: it may drive up the rates consumers otherwise may pay for local service or, as alleged in this case, reduce the quality of that service; it reduces consumer choice if competitors find it difficult to enter the local market or, having entered, find it difficult to expand or even remain in the market or expand their service territories; and, it may even lead to an erosion of competition in other markets, such as the long distance market, if the local incumbent is able to use its unfairly maintained local monopoly to leverage its position in those markets.[11]

[11] NASUCA hardly considers this latter situation to be academic. Bell operating companies are increasingly winning FCC approval to provide in-region, interLATA service pursuant to Section 271 of the 1996 Act. *See* "§271 Applications Filed With the FCC," http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/. With FCC approval, Bell companies can offer bundled telecommunications packages that include local and long distance wireline service, data services and even wireless services. In a relatively short time since receiving Section 271 approval, Verizon has captured large percentages of the long distance markets: 38% in New York, 34% in Massachusetts, 31% in Connecticut and 20% in Pennsylvania, according to a January 2003 survey. *See* "Verizon Claims Third Largest Market Share in Long Distance Voice" (January 7, 2003) http://www.convergedigest.com/Bandwidth/newnetworksarticle.asp?ID=5971.

Second, there should be no risk of multiple liability in allowing consumer antitrust actions stemming from an incumbent LEC's unlawful anticompetitive conduct. The lost profits that a potential entrant suffers from such conduct "can be cleanly separated from the reduction in consumer surplus inflicted on consumers who lose the benefit of competition between the incumbent and the entrant." Picker, "Understanding Statutory Bundles," *supra* at 15.

Third, excluding private antitrust actions by consumers presents a problem if competitors have insufficient means or incentive to litigate their rights under the 1996 Act. With regard to the former, local competition in many states is provided by small, locally-based competitors rather than large carriers with a national, or even regional presence.[12] Expecting consumers to rely on small, local competitors to litigate zealously against the incumbents for alleged violations of the 1996 Act, and thereby advance the goals and objectives of the 1996 Act, ignores the reality of those competitors' limited resources.

Competitive LECs ("CLECs") may also have less incentive to litigate their rights under the 1996 Act due, ironically, to anti-backsliding regimes adopted by the Bell operating companies in order to win FCC authorization to provide in-state, interLATA telecommunications service under Section

[12] For example, in Kansas, the largest local competitor is Birch Telecom, Inc., which operates in one or two other states and holds about a 7.5% share of the local market Kansas. In West Virginia, the largest local competitor is FiberNet, LLC, which operates exclusively in West Virginia and holds about a 5% share of the local market. Based on its participation in state regulatory proceedings. NASUCA knows that the Kansas and West Virginia are not the only states in this situation. *See* "Local Telephone Competition: Status as of December 31, 2002," Tables 6 & 12 (June 2003) http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0603.pdf.

271 of the 1996 Act. *See* 47 U.S.C. § 271. These anti-backsliding regimes typically consist of carrier-to-carrier metrics, which measure the objective performance of the Bell operating company in implementing its Section 251 obligations across a number of operational areas (typically pre-ordering, ordering, provisioning, repair and maintenance, and billing), coupled with compensatory mechanisms. Failure to achieve the level of performance stated in the carrier-to-carrier metrics results in monetary compensation (usually in the form of bill credits) to those CLECs that are adversely affected by the regional Bell's substandard performance. The first anti-backsliding regime was proposed by Verizon in New York and such regimes have become an integral element in securing Section 271 approval from the FCC.[13] These anti-backsliding regimes do not address all potential incumbent anticompetitive conduct under either the 1996 Act or the antitrust laws.

It is entirely possible that CLECs have, to some degree, been co-opted by these anti-backsliding regimes from litigating ILEC noncompliance with their obligations under Sections 251 and 252 of the 1996 Act. To NASUCA's knowledge, there is no hard data relating to this question. But it is reasonable to assume that the anti-backsliding regimes

[13] *See, e.g.*, "Memorandum Opinion and Order," *I/M/O Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404 (December 22, 1999); "Memorandum Opinion and Order," *I/M/O Application by SBC Communications Inc., et al., for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in Texas*, CC Docket No. 00-65, FCC 00-238 (June 30, 2000); "Memorandum Opinion and Order," *I/M/O Application by Qwest Communications International, Inc. for Authorization To Provide In-Region InterLATA Service in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, FCC 02-332 (December 23, 2002).

have caused at least some CLECs to forego the time and expense associated with bringing claims for violations of the 1996 Act.

Fourth, the ability of the FCC and state commissions to impose fines for anticompetitive conduct by incumbent LECs in violation of the Act does not suffice to protect the consumer interest embodied in the 1996 Act. In their day-to-day role as consumer advocates before state and federal regulatory agencies, NASCUA members can attest to the inadequacy of fines alone to protect those consumer interests expressly identified in the 1996 Act.

Despite incumbent protests to the contrary, it is reasonable to conclude that their management justifies violations of the Act as cost effective compared to compliance. "Merrill Lynch analyst Ken Hoexter, who tracks SBC, wrote earlier this year [2002], 'As long as the cost of violating merger agreements is below the cost of allowing competitors to enter the market, it continues to be cheaper to pay the government.'"[14] Put another way:

> The incumbent loses more from competition than the entrant gains . . . . The incumbent could afford to pay the entrant's damages and have money left over. This just reflects the fact that *as between the incumbent and the entrant, the incumbent's breach is efficient* . . . . We actually need the threat of both [consumer and competitor] suits to deter the breach . . . .

Picker, "Understanding Statutory Bundles," *supra* at 10.

As long as fines are treated by incumbents as a cost of doing business, and in fact a lower cost than facing genuine competition in compliance with the 1996 Act, the local network bottleneck will remain a major obstacle to access to

[14] Peter J. Howe, *Wrong Numbers*, Boston Globe, May 20, 2002, at page C1, columns 2-4.

the network, thereby depriving consumers of the choice of providers intended by the Act.

The local telecommunications market presents multiple, subtle opportunities for anticompetitive conduct to arise. Enforcement of the Act's obligations by competitors may not be effective to remedy or deter monopolistic practices that injure consumers. To overcome these shortcomings, and to achieve the pro-consumer goals embodied in the Act, it is vital to preserve consumers' private rights of action under federal antitrust laws.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed as in the best interest of consumers who are the Congressionally-intended beneficiaries of the antitrust laws and the 1996 Act.

Respectfully submitted,

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July 25, 2003